

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA)	
)	
Plaintiff/Respondent,)	
)	Crim. Action No. 99-29-SLR
v.)	
)	Civil Action No. 00-839-SLR
MARK McMENEMIN,)	
)	
Defendant/Petitioner.)	
)	

Mark McMenemy, Montgomery, Pennsylvania. Petitioner pro se.

Carl Schnee, United States Attorney and Richard G. Andrews, First Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Respondent.

MEMORANDUM OPINION

Dated: December 10, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Mark McMenemin is an inmate at the Federal Correctional Institution in Montgomery, Pennsylvania. Currently before the court is petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 26) Because the court finds that petitioner's claims are without merit, his motion is denied.

II. BACKGROUND

On April 21, 1999, petitioner pled guilty to one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A). (D.I. 25) On July 21, 1999, the court sentenced defendant to 120 months of imprisonment, followed by 5 years of supervised release. (D.I. 23 at 16) Petitioner did not file an appeal with the Third Circuit Court of Appeals. On September 15, 2000, petitioner filed a pro se motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 26)

III. STANDARD OF REVIEW

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152 (1982); United States v. Shaid, 937 F.2d 228 (5th Cir. 1991). Prisoners in federal custody may attack the validity of their sentences via 28 U.S.C. § 2255. Section 2255 is a vehicle to

cure jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 784 (1979). See also U.S. v. Addonizio, 442 U.S. 178 (1979); United States v. Essig, 10 F.3d 968 (3rd Cir. 1993). "Generally if a prisoner's § 2255 [petition] raises an issue of material fact, the district court must hold a hearing to determine the truth of the allegations." Essig, 10 F.3d at 976. A defendant is not entitled to a hearing if his allegations are contradicted conclusively by the record, or if they are patently frivolous. Solis v. United States, 22 F.3d 289 (3rd Cir. 2001). In the same vein, "[a] district court need not hold a hearing if the motion and files and records of the case show conclusively that the movant is not entitled to relief." United States v. Melendez, No. CRIM 00-00069-01, CIV 01-3305, 2001 WL 1251462, at *2 (E.D. Pa. Sept. 21, 2001) (citing Government of the Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989)).

IV. DISCUSSION

Petitioner raises three grounds for relief: (1) the court failed to properly advise petitioner of the penalties associated with his guilty plea, in violation of Fed. R. Crim. P. 11(c)(1); (2) petitioner was denied his right of allocution, in violation

of Fed. R. Crim. P. 32; and (3) petitioner received ineffective assistance of counsel.

A. Fed. R. Crim. P. 11 (c)(1) Violation

Petitioner alleges that the court violated Rule 11(c)(1) of the Federal Rules of Criminal Procedure by failing to inform him of the maximum possible penalty provided by law. (D.I. 26) Specifically, he claims that the court did not inform him that there was a supervised release term to follow any incarceration. (Id.)

Petitioner's argument is without merit because it is based on a misinterpretation of the record. During the change of plea hearing, the court informed petitioner of the maximum penalty associated with his guilty plea as "life imprisonment with a minimum mandatory term of 10 years imprisonment, a \$4 million fine, **at least 5 years of supervised release** and a \$100 special assessment." (D.I. 25 at 6) (emphasis added) Subsequently, the court recognized that it had been reading the original draft of the plea agreement, and not the final version corrected to reflect the total amount of crack cocaine attributable to the petitioner for sentencing purposes. (Id.) The court continued the hearing with the correct plea agreement. (Id.)

Petitioner erroneously assumes that because the court initially read the wrong plea agreement, all statements made in connection with the plea hearing are null. The only difference

between the two plea agreements was the stipulation concerning the weight of the drugs. Because this correction had nothing to do with the maximum penalties, petitioner's claim that he was not informed about the supervised release term is not supported by the record.

Petitioner's argument is also procedurally defaulted because this is not the type of claim that can be raised in a § 2255 proceeding. See United States v. Timmreck, 441 U.S. 780 (1979). Under Timmreck, "[a] conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11." Id. Likewise, petitioner has not claimed that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." Id. at 784. Petitioner failed to raise this claim on direct appeal, and there is no basis here for allowing a collateral attack.

B. Fed. R. Crim. P. 32 Violation

Petitioner alleges that the court violated Rule 32 of the Federal Rules of Criminal Procedure by denying his right of allocution. (D.I. 26) Rule 32 requires the court to "address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence." Fed. R. Crim. P. 32.

Petitioner correctly states that he was not given the opportunity to allocute in the manner prescribed by Rule 32. During the sentencing hearing, the court reviewed the sentencing guideline calculations and sentenced petitioner immediately thereafter without providing petitioner the opportunity to allocate. (D.I. 23 at 17) Counsel for petitioner did not object and the court recognized, sua sponte, that it had failed to give petitioner the opportunity to allocute. (Id.) The court then gave him an opportunity to allocute, and he exercised this right.¹ (Id. at 17, 18) Under Hill v. United States, failure of the judge to follow the formal requirements of sentencing regarding allocution is not a cognizable error under § 2255. 368 U.S. 424 (1962) The court will not review petitioner's claim because he failed to raise it on direct appeal.

C. Ineffective Assistance of Counsel

The Sixth Amendment guarantees an accused the assistance of counsel in all criminal proceedings, and the Supreme Court has interpreted this right to mean the effective assistance of counsel. See Strickland v. Washington, 464 U.S. 668 (1984). A defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, the result

¹The court notes in this regard that the sentence reflected a downward departure and that defendant's remarks were directed to his family, not the court. (D.I. 23 at 15-18)

of the proceeding would have been different. Id. at 686, 694. In the context of challenging a guilty plea based on ineffective assistance, a defendant must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). In determining whether counsel's conduct was deficient, the court must consider the totality of the circumstances of the case and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688, 689.

Petitioner alleges that he was denied effective assistance of counsel for the following reasons: (1) counsel failed to object to Rule 11 and Rule 32 violations; and (2) counsel incorrectly persuaded him that there were no meritorious issues to be pursued on appeal. (D.I. 26 at 18) Both of petitioner's claims lack merit.

Regarding the first allegation of counsel's failure to object, counsel did not act improperly. As previously stated, there was no Rule 11 violation because the court found that petitioner was properly informed of the maximum possible sentence. Likewise, failure of the court to follow the formal requirements of Rule 32 was not a cognizable error. Counsel's

performance cannot be held deficient for failing to challenge the validity of these issues.

Petitioner also argues that counsel persuaded him that there were no meritorious issues to be pursued on appeal. His argument is merely conclusory, as it neither specified the particular actions that counsel failed to take, nor the resulting prejudice. Petitioner has not demonstrated how the court's failure to consider these claims will otherwise result in a fundamental miscarriage of justice. Accordingly, the court is procedurally barred from considering this claim of ineffective assistance of counsel.

V. CONCLUSION

For the reasons stated, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied. An appropriate order shall issue.

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 MARK McMENEMIN)
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Sue L. Robinson
United States District Judge